SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 736

REPUBLIC OF IRAQ, *Petitioner,*

v.

THE FIRST NATIONAL BANK OF CHICAGO, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CARL L. SHIPLEY
1204 National Press Building
Washington, D. C. 20004
Attorney for Petitioner,
Republic of Iraq

Of Counsel:

SHIPLEY, AKERMAN & PICKETT
1204 National Press Building
Washington, D. C. 20004

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Carl L. Shipley, on behalf of the Republic of Iraq, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is No. 14663, dated August 12, 1965, and is set out *infra* in the appendix hereto, at page 1(a).

JURISDICTION

Jurisdiction of the Supreme Court of the United States is invoked pursuant to Title 28, U.S. Code, Section 2101 and Rules 19, 21, 22 and 23 of this Court.

QUESTIONS PRESENTED

1. Does a complaint filed by the Republic of Iraq, a sovereign nation with which the United States historically has maintained friendly relations, present a justiciable controversy under the Declaratory Judgment Act, and state a claim upon which relief can be granted, when said complaint requests a judgment declaring that (1) decrees of an Iraqi court of competent jurisdiction appointing an Iraqi paternal uncle, brother of an Iraqi decedent, guardian of the persons and estates of his surviving Iraqi children, must be given full faith and credit by the Cook County Illinois Probate Court under the principle of private international law known as "comity of nations", and (2) further declaring that assets of a decedent's estate held contrary to the provisions of said Iraqi judicial decrees are held contrary to law and must be delivered over to the guardian of said estates appointed by competent Iraqi judicial authority under the laws of that sovereign nation?

STATUTES INVOLVED

The Declaratory Judgment Act of 1934, 28 U.S.C. 2201, provides in pertinent part:

> "In a case of actual controversy within its jurisdiction * * * any Court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

The Iraq Nationality Law, Part 1, Article 8(a), Act of October 9, 1924, provides in pertinent part:

"The following persons shall be deemed to be Iraq nationals:

(a) Any person wherever born, whose father was at the time of that person's birth an Iraq national * * *"

The Illinois Probate Act, 1963, amended by Act approved May 25, 1955, provides in pertinent part:

§ 96. PERSONS ENTITLED TO PREFERENCE IN OBTAINING LETTERS.] The following persons are entitled to preference in the following order in obtaining the issuance of letters of administration of the various kinds:

(1) The surviving spouse or any person nominated by him.

(2) The children or any person nominated by them.

(3) The grandchildren of any person nominated by them.

(4) The father and mother or any person nominated by them.

(5) The brothers and sisters or any person nominated by them.

(6) The next of kin or any person nominated by them.

(7) The Public Administrator.

(8) A creditor of the estate.

In the event no executor is named in a will or in the event the executor named in a will is disqualified or fails to accept the trust for any reason, letters of administration with the will annexed shall be granted in accordance with the preferences as above set forth.

Only persons qualified to administer under this Act shall have the right to nominate, except that a person who was not qualified to act as administrator solely because of non-residence in this State has the right to nominate in accordance with the order of preference set forth in this Section if he is a resident of any state of the United States or of the District of Columbia. A person who has been removed as executor or administrator under this Act loses his right to name his successor.

(Amended by Act Approved June 13, 1963.)

§ 97. WHEN SEVERAL ARE EQUALLY ENTITLED.] When several persons are claiming and are equally entitled to administer or to nominate an administrator, the court may grant letters to one or more of them or to the nominee of one or more of them, preferring those of the whole blood or their nominee to those of the half blood or their nominee.

§ 98. PETITION FOR LETTERS.] A person desiring to have letters of administration issued on the estate of a deceased person shall file a verified petition therefor in the probate court of the proper county. The petition shall state if known: (1) the name and place of residence of the decedent at the time of his death; (2) the time and place of death; (3) the approximate value of the decedent's real and personal estate in this state; (4) the names and post office addresses of all heirs, devisees and legatees of the decedent and whether any of them is a minor; (5) the name and address of the person nominated as administrator; (6) the facts showing the right of the petitioner to act as or to nominate the administrator; (7)

when letters of administration de bonis non or of administration de bonis non with the will annexed are sought, the reason for the issuance of the letters; and (8) when original letters of administration are sought on the legal presumption of death, the facts and circumstances raising the presumption, the name and post office address of each person in possession or control of any property of the decedent and the last known post office address of the decedent. A petition for letters of administration with the will annexed may be joined with a petition to admit the will to probate. When the will creates or adds to a trust and the petition states the name and address of the trustee, the petition need not state the names and addresses of the beneficiaries of such trust who are not heirs of the testator, nor whether any of them is a minor. (Amended by Act approved May 25, 1955.)

§ 99. MAILING OF COPY OF PETITION TO PERSON HAVING PREFERRED RIGHT.] When a person is entitled either to administer or to nominate a person to administer in preference to the petitioner, the clerk of the probate court, not less than twenty days before the hearing on the petition, shall send a copy thereof to that person by mail if his name and post office address are stated in the petition. It is the duty of the clerk to endorse the time and place of the hearing on each copy of the petition mailed by him. A copy of the petition need not be sent to any person who personally appears before the probate court at the hearing thereon or who files his waiver of notice in writing.

§ 133. POWER TO APPOINT GUARDIAN.] On the filing of a verified petition by a reputable citizen of this state or on its own motion the probate court may appoint a guardian for a minor wherever it appears necessary or convenient. If the minor is a resident of this state, the guardian of his estate and person shall be appointed by the probate court

of the county in which he resides. If the minor is not a resident of this state, the guardian of his estate shall be appointed by the probate court of the county in which he owns real estate or, if he owns no real estate in this state, by the probate court of the county in which he owns personal estate.

§ 134. RESIDENCE OF GUARDIAN.] A non-resident of this state may be appointed as guardian of the person of a minor but not as guardian of his estate.

§ 135. NOMINATION BY COURT—MINOR UNDER FOURTEEN.] If the minor is under the age of fourteen years, the probate court may nominate the guardian of the person and the guardian of the estate of the minor.

§ 136. NOMINATION BY MINOR—OVER FOURTEEN.] If the minor is above the age of fourteen years and has no guardian, he may nominate the guardian of his person and estate who, if approved by the court, shall be appointed accordingly; if not approved by the court, or if the minor resides out of the state, or if, after being cited, the minor neglects to nominate a person who meets with the approval of the court, the court may nominate the guardian in the same manner as if the minor were under the age of fourteen years.

§ 137. CONTENTS OF PETITION.] All petitions for the appointment of a guardian shall state: (1) the name, date of birth and place of residence of the minor; (2) the approximate value of his personal estate; (3) the amount of his anticipated gross annual income and other receipts: (4) the name and post office address of the person having the custody of the person of the minor; (5) the name, post office address and, in case of an individual, the age and occupation of the proposed guardian. (Amended by Act approved April 19, 1961.)

Rule 14.10. Probate Court of Cook County, Illinois:

Rule No. 14.10—Appointment of Guardian

"In addition to the requirements of the Probate Act, a petition for the appointment of a guardian shall state the names and post office addresses, if known, of the minor, the person having his custoday, and his nearest relatives.

Notice of the time and place of the hearing shall be given to the minor, if he is over 14, to the person having his custody, and to his nearest relatives, in the following order:

(a) To each parent and to the minor's sponsors, if any; or

(b) If he has no living parent, to his nearest adult relative, and to the minor's sponsor, if any.

Five days' notice must be given to each person entitled to notice who is a resident of this State, and ten days' notice to each person entitled to notice, who is not a resident, except that the Judge may waive the giving of notice when notice is not deemed necessary for the protection of the minor or his estate."

PRELIMINARY STATEMENT

On September 12, 1961 Mr. and Mrs. Subhi Fakhri were killed in a common disaster in an Air France airplane crash at Rabat, Morocco. Mr. Fakhri was an Iraqi citizen travelling on an Iraqi passport. His wife was a British subject. Their visas were obtained in Canada. The deceased came to the United States temporarily as a student at the expense of the Iraq government.

He left 5 minor children, 2 of whom were born in England, and 3 in the United States. Under Iraqi law children of an Iraqi citizen are Iraqi nationals

from time of birth, regardless of where they were born.

On September 18, 1961 the Court of Personal Affairs of Baghdad appointed Col. Jehad A. Fakhri, the children's paternal uncle, as guardian of their persons and estates. (See page 1b, appendix hereto, Decree No. 609.)

On September 18, 1961, the Court of Personal Affairs of Baghdad issued a Certificate of Inheritance dividing the estate of Mr. Subhi Fakhri in 6 equal parts, 1 each to his mother and 5 children (see page 1c, appendix hereto, Decree No. 472). It is a court of competent jurisdiction. (See page 1d and e, appendix hereto.)

On September 19, 1961, the Probate Court of Cook County accepted a petition for appointment of guardians, and on the same day issued Letters of Guardianship to a maternal uncle, a U. S. citizen, and a maternal grandmother, a British citizen, of the children, and to the First National Bank of Chicago and the maternal uncle as guardians of the children's estates. Subsequently the maternal uncle resigned as co-guardian of the estates of the children, leaving only the First National Bank. No 10 day notice of the Probate Court proceedings was given to the Government of Iraq or next of kin, including the decedents mother, as required by the rules of said Court. On October 3, 1961, the Iraq Embassy in Washington advised said Court of its interest in the case, but said letter (page 1b, appendix hereto) was ignored.

On September 26, 1961 the Illinois Public Administrator filed petitions for Letters of Administration of the estates of the decedents, Subhi Fakhri and Suzy Fakhri, his wife. Said letters were issued to the Pub-

lic Administrator in the Subhi Fakhri estate on September 27, and in the Suzy Fakhri estate on September 26.

Petitioner instituted suit for declaratory judgment in the United States District Court, Northern District of Illinois, Eastern Division, and on defendants' motion to dismiss, the Court ruled:

> "I am deciding this on the basis that this Court is without jurisdiction to enter a decree for declaratory judgment which, in effect, would be a collateral attack on the Probate Court of Cook County. I think that the order entered by the Probate Court of Cook County was res judicata and it is not subject to collateral attack in this Court."

Thereafter, upon review, the United States Court of Appeals for the Seventh Circuit ruled:

> "We think the result reached by the district court was correct, but for reasons that the complaint present no justiciable controversy and fails to state a claim upon which relief can be granted".

Petitioner believes that as a matter of sound judicial discretion a review on writ of certiorari should be granted for the following special and important reasons within the scope of Rule 19 of this Court:

The Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this court; and has decided an important question of federal law which has not been, but should be, settled by this court; and has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision, all as set out hereinafter.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I. Petitioner Has Standing

The Court of Appeals states at page 5 of its decision (page 5a, appendix) that the Republic of Iraq lacks standing to assert claims for itself and for its nationals. The Declaratory Judgment Act (28 U.S.C. 2201) confers standing in terms on any "interested party". As stated in *Philco Corporation* v. *FCC,* 257 F.2d 656, 658, cert. den. 358 U.S. 946:

> "* * * sufficient breadth must be given to 'party in interest' to permit those seriously affected to participate in the administrative and judicial proceedings * * *." See also *NBC* v. *FCC,* 319 U.S. 239.

It is generally held that a court is an "interested party", as the representative of the state as the guardian of the interest and welfare of its children. *Brown* v. *Brown,* 134 F.2d 505. Thus, a sovereign nation certainly is an "interested party" under the Act to assert the claims of its minor nationals, whether directly, as next friend, or *ex relatione.* In the instant case the complaint of the Republic of Iraq clearly states the suit is in behalf of Iraq itself, the 5 Iraqi children, and the widowed mother of the children's father, herself entitled to a 1/6 interest in her son's estate under Iraqi law. Certainly the Republic of Iraq has an interest in having its own judicial decrees affecting its nationals recognized by U. S. courts as a matter of comity.

II. Petitioner's Complaint Presents a Justiciable Controversy

The Court of Appeals at page 3a, appendix, conditions the federal right to a declaratory judgment on a "personal, immediate and substantial interest * * *

against a party against whom the requested relief can be granted." The Court of Appeals ignores the actual awarding of 28 U.S.C. 2201, which creates the declaratory judgment to:

> "* * * declare the rights and other legal relations of any interested party, whether or not further relief is or could be sought."

In *Willner* v. *Committee on Character,* 373 U.S. 96, this Court held that a claim of a present right to admission to the bar of a state presented a justiciable controversy. The Republic of Iraq claims a present right to have its judicial decrees recognized by the Probate Court of Cook County. Petitioner respectfully submits this presents a justiciable controversy. See also *Baker* v. *Carr,* 369 U.S. 186, where reference is made to laws of the United States and treaties made under the authority of the United States as a basis for justiciable controversy. As pointed out hereinafter, petitioner claims a right under the United Nations Charter to have its judicial decrees recognized under "principles of justice and international law." The Declaratory Judgment Act is remedial, and must be given a liberal construction. See *Tennessee Coal Co.* v. *Muscoda Local No. 123,* 137 F.2d 176, aff'd 321 U.S. 590. *Simmonds Accessories, Ltd.* v. *Elastic Stop Nut Corporation,* 257 F.2d 485; *Donnely* v. *Mavar Shrimp & Oyster Co.,* 190 F.2d 409. *Oil Workers International Union, Local No. 463* v. *Texoma Natural Gas. Co.,* 146 F.2d 62, cert. den. 324 U.S. 872, rehearing den. 325 U.S. 893, holding, "The Declaratory Judgment Act should be liberally construed, *Mississippi Power & Light Co.* v. *City of Jackson,* 116 F.2d 924, cert. den. 312 U.S. 698." If the judicial decrees of Iraq are entitled to full and faith and credit under

the international law principle of comity of nations, and the principles of international are recognized under the United Nations Charter to which both the U. S. and Iraq are signatories, then the First National Bank, respondent herein, is acting unlawfully in asserting rights as guardian of the estates of the Fakhri children, since the Iraqi judicial decrees of prior date designate Colonel Jehad Fakhri, paternal uncle, as guardian of the minors and their estates.

III. Probate Court of Cook County Had No Statutory Authority to Appoint Guardian

Paragraph 133 of the Probate Act of Illinois, limits the power of the Cook County Probate Court to appoint guardians to a situation where the "minor is a resident", or, if he is not a resident, where he owns real estate or personal estate. In the instant case the 5 children were infants, and as such would by law take the residence of their father. He was temporarily in Illinois as an Iraqi citizen on an Iraqi passport with a Canadian visa, with a British wife, a British mother-in-law and father-in-law, and was sent here by the Iraq Government as a student in Colorado. He was killed in Morocco in a French plane. All of his contacts were with and in Iraq. He had no permanent contacts with the United States or Cook County. "Resident" as it appears in the Illinois Probate Act must be construed to mean permanent domicile, not just temporary physical presence. The "contacts" test justifying State jurisdiction over a person or his property is discussed in *Texas* v. *New Jersey,* No. 13, orig. doc. Feb. 1, 1965, Sup. Ct. of U.S., *McGee* v. *International Life Insurance Co.,* 355 U.S. 220 and other cases cited therein. Under the "contracts" test, the minor children involved herein were

not residents within the meaning of the Illinois Probate Act to give the Cook County Probate Court jurisdiction to appoint a guardian and ignore the prior Iraq decrees appointing a different guardian.

IV. The Iraq Judgments Must Be Honored

In the tri-partite convention of January 9, 1930 between the United States, Great Britain, and Iraq concerning the rights of the United States of America and of its nationals in Iraq, it was declared (par. 9 of the preamble) that the United States recognized Iraq as an independent state. This convention came into force through the exchange of ratifications in London on February 24, 1931, and its proclamation by the President on March 11, 1931, and incorporated by reference the covenant of the League of Nations. 47 Stat. 1817, 1819.

Iraq is a member of the United Nations, and has joined with the United States in signing the U. N. Charter on June 26, 1945, which binds all parties to rely upon the "principles of justice and international law," for the settlement of international "disputes or situations." 59 Stat. 1033, 1037, 1203.

In addition to the original treaty of recognition, treaties in force between the United States and Iraq today include a treaty on customs (5 UST 657); defense (6 UST 6014; 8 UST 873; 10 UST 1415); economic and technical cooperation (3 UST 541, 4748); education (2 UST 1908); extradition (49 Stat. 3380); lend-lease (59 Stat. 1535); passport visas (7 UST 1067); publications (58 Stat. 1253); and trade and commerce (54 Stat. 1790), all of which are instinct with the principle of international comity. Treaties

in Force, Jan. 1, 1964, Dept. of State Publication 7645.

In an official ruling U. S. Attorney General Cummings wrote Secretary of State Hull on November 30, 1936:

> "The extent to which foreign judgments are given faith and credit in the United States is determined by decisions of the courts, which apply the principle of the comity of nations. There are no statutes governing the matter in this country. Courts in the United States allow judgments rendered in a foreign country the same effect as the courts of that country allow judgments rendered in the United States."
>
> Attorney General Cummings to Secretary Hull, November 30, 1936 MS. Department of State, file 844 D. 04600/2.

In his official opinion cited above, the Attorney General cited *U. S.* v. *Guyot,* 159 U.S. 113, 202-203, as a summary of the applicable rule:

> "* * * where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction * * * and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh * * * the defendants * * * cannot be permitted * * * to contend the validity or the effect of the judgment sued on." *U. S.* v. *Guyot,* 159 U.S. 113, 202-3; Digest of International Law, Hackworth, U. S. Gov. Prtg. Off., Wash., 1941, p. 89, et seq.

Under the Iraq Nationality Law, all persons born of an Iraqi father are Iraqi citizens and nationals:

> "Art. 8.—The following persons shall be deemed to be Iraq nationals:
>
> (a) Any person wherever born, whose father was at the time of that person's birth an Iraq national * * *"
>
> Iraq Nationality Law, Part I, Art. 8, Act of October 9, 1924, Ministry of Justice, Baghdad, Iraq.

Under the Decrees No. 609 and No. 472, (pages 1c, 2c, 1d, 2d, appendix) the Court of Personal Affairs of Baghdad decreed that Colonel Jehad Fakhri, paternal uncle of the 5 Fakhri children, was the guardian of their persons and estates, and divided the estate of the deceased Subhi Fakhri in 6 equal shares, 1 to his surviving mother, Nouriah, and 1 share to each of his 5 children, Amal, Ahmad, Samiramis, Omar and Azza, in accordance with Iraqi law.

Under Iraq law the deceased's mother is entitled to share with his surviving children in his estate. The decedent, his mother, and all of his children were Iraqi nationals, and he was travelling on an Iraq passport, as set out hereinabove. See pages 1c, 2c, 2b, 1e, appendix.

> Iraqi Personal Status Law No. 188 of 1959 (copy attached). Outlines of Mohammedan Law, 2d ed., Asof A.A. Fyzee, 1955, Oxford Univ. Press, p. 336, 342, 346 (U.S. Library of Congress).

The rule of law in Illinois is that a foreign judgment is given the same force and effect as that of a sister state.

> "* * * By rule of comity, the same force and effect is given to judgments of foreign countries

as is given to sister states." *Truscon Steel Co. of Canada* v. *Biegler,* 28 N.E. 2d 623, 306 Ill. 180.

The court of appeals refused to follow this Illinois rule of law.

The decree of a court of a foreign country having jurisdiction of a decedent's estate cannot be questioned as to its validity, in the absence of a showing of irregularity. *Royal Baking Powder Co.* v. *Hessey,* 76 F.2d 645. There was no showing of irregularity of the two Iraqi decrees herein involved.

The fact that the decedent and his children were all Iraqi citizens, having their rights subject to determination by Iraqi law, should control the decedent's estate, and compel recognition of the Iraqi judgments. No question is raised as to the paramount Iraq nationality of the children. Their U. S. and/or British citizenship is a pure accident of geography, resulting from their deceased father's business travel, and neither the rights of the decedent's mother or the right of guardianship of the paternal uncle should be defeated by the temporary presence of the children in Illinois at the time their Iraq parents died in Morocco —far from the United States. The Probate Court of Cook County ignored the following rule of law, and the court of appeals side-stepped it:

> "It would appear that considerations of comity and reciprocity would * * * preclude American courts from entertaining a collateral attack upon a decree * * * entered by a foreign court." *McKay v. Alexander,* 268 F.2d 35.

The judgments of foreign courts are prima facie valid in U. S. courts. A United States federal court can judicially notice foreign court procedures. The

court of appeals should have noticed the Iraq decrees. *N. Y. Life Ins. Co.* v. *Panagiotopoulas,* 83 F.2d 957, 900. *In re Alstiebalaget Kruger & Toll,* 20 F. Supp. 904. *Spann* v. *Compania Mexicani,* 131 F.2d 609.

A right in personam involving a decedent's estate is enforceable in a federal court despite a state law making it enforceable in a state court:

> "* * * the federal courts may entertain actions, within their diversity and historic-equity jurisdiction, involving claims to decedents' estates; notwithstanding the fact that the laws of the state * * * limit the right to establish such demands to a proceeding in the probate courts of the state (cases cited)." *Jackson* v. *U. S. National Bank,* 153 F. Supp. 104.

A federal court may set aside a state court judgment for equitable reasons or grounds recognized by the state. *O'Boyle* v. *Bevil,* 259 F.2d 506, cert. den. 359 U.S. 913. The court of appeals ignored these rules of law in petitioner's case herein.

V. The Government of Iraq Received No Notice

Under the law of Illinois, letters of administration could only issue upon filing of a verified petition containing names of all next of kin (3 Ill. Rev. Stat. 1961, par. 98), and a copy of the petition should have been sent to the Government of Iraq through its Embassy in Washington, D. C., and an effort made to notify the decedent's mother in Iraq. No such effort was made with respect to letters of administration, or guardianship of the persons or estates of the minors involved. Ch. 3. Ill. Rev. Stat. 1961, Par. 98, 131, et seq., and 401.1, 401.2, and Rule 14.10, Probate Court of Cook County (10 day notice).

CONCLUSION

The petitioner herein, the Republic of Iraq, respectfully submits that the two decrees dated September 18, 1961, issued prior to the actions of the Probate Court of Cook County, are entitled to full faith and credit under the principles of international comity. Moreover, the failure of the Probate Court of Cook County to assure itself that next of kin and interested parties, including decedent's mother in Iraq and the Government of Iraq, had received notice of the court's orders of September 19, 1961, invalidates said orders. Apparently the Probate Court issued letters of guardianship of the persons and estates the day the petition was filed, without notice. Further, the petition for letters of administration appears to have been filed September 26, 1961, and the letters of administration issued on September 26 and 27, 1961, without notice. Petitioner verily believes its important interests are entitled to consideration, since the entire proceedings involves Iraqi citizens and children, and property of an Iraqi national, all only in Illinois by chance on the date of Subhi Fakhri's death. Even his death was outside Illinois thus, not a matter giving rise to any right of the First National Bank to intrude itself into an Iraq matter, and seek to become guardian of the estate of Iraq children. All significant contacts were with Iraq, not Illinois.

WHEREFORE, the premises considered, petitioners respectfully submit that they have set forth hereinabove special and important reasons for the exercise of sound judicial discretion by this Court in reviewing the opinion and decision of the U. S. Court of Appeals for the Seventh Circuit on writ of certiorari.

For the foregoing reasons, it is respectfuly submitted that this petition for a writ of certiorari should be granted. There is no avenue of relief from the erroneous decision of the Court of Appeals violating rights of petitioner herein except this Court.

CARL L. SHIPLEY
Attorney for Republic of Iraq
1204 National Press Building
Washington, D. C. 20004

Of Counsel:

SHIPLEY, AKERMAN & PICKETT
1204 National Press Building
Washington, D. C. 20004